

Dockside Brewing Co. v. Strata Plan LMS 3837

Between

Dockside Brewing Company Ltd. and Klaus Jurgen
Scholz, petitioners, and
The Owners, Strata Plan LMS 3837, Patrick A.
Williams, Clark, Wilson, Khoon Wah Alfred Tan, Lam
Siat Khevn, Peck Kiat Chee, Lye Eam Tan, Tuck Fai
Tham, Tan Hui Chuan, Ah Kow Foo and Toong Jin Lam,
respondents

[2005] B.C.J. No. 1865

2005 BCSC 1209

Vancouver Registry No. L042671

British Columbia Supreme Court

Vancouver, British Columbia

E.R.A. Edwards J.

Heard: June 15, 2005.

Judgment: August 23, 2005.

(81 paras.)

Counsel:

Counsel for the Petitioners: R.J. Sewell, Q.C. S.A. Griffin

Counsel for all Respondents other than The Owners, Strata Plan LMS 3837, Patrick A. Williams and Clark, Wilson: G.S. Hamilton

Counsel for the Respondent The Owners, Strata Plan LMS 3837A: M. Murray

¶ 1 **E.R.A. EDWARDS J.**— The petitioners apply under Rule 18A for the following relief:

- (a) a Declaration that the Strata Councils elected on May 13, 2002 and February 27, 2003 have acted in a manner which is significantly unfair to the Petitioners by using monies from the operating funds of the Strata Corporation to pay nonrecurring expenses in the form of legal fees to the law firms Miller Thomson; Edwards, Kenny & Bray; Clark, Wilson and other law firms in respect of legal proceedings contrary to the wishes and interest of the Petitioners without obtaining a 3/4 resolution of the members of the Strata Corporation at an Annual General Meeting or Special General Meeting as required by the Strata Property Act (the "SPA");
- (b) An Order that the Respondents Khoon Wah Alfred Tan, Lam Siat Khevn, Peck Kiat Chee, Lye Eam Tan, Tuck Fai Tham, Tan Hui Chuan, Ah Kow Foo and Toon Jin Lam, being members who controlled a majority of the 2002 and 2003 Strata Councils (collectively the "Respondent Strata Council Members") who approved the payment of legal fees to Miller, Thomson and Edwards, Kenny & Bray or Clark, Wilson, be required to indemnify the Strata Corporation for any such amounts paid pursuant to Section 33 of the SPA;
- (c) In the alternative, that only those owners of strata lots in the Strata Corporation who

are members of the Le Soleil Owner's Group ("LSOG") be responsible for the payment of such legal fees and that all other owners be exempted from responsibility for payment of such legal fees.

¶ 2 Counsel for The Owners Strata Plan LSM 3837 provided a letter to the Court referring to a resolution of the owners approved at the January 31, 2005 Annual General Meeting of the Strata Corporation that: "the owners support the complaint lodged by the petitioners ... in SCBC Action Number L042671", as a result of which the letter states "the Strata Corporation does not intend to take a position in the above noted action".

¶ 3 No relief was sought against the respondents Patrick A. Williams and Clark, Wilson, who were not represented at the hearing.

¶ 4 Mr. Hamilton, on behalf of those respondents he represents ("the Respondent Strata Council Members"), consented to an order

directing and declaring that the following owners may vote on all resolutions presented at the special general meeting initiated by certain owners pursuant to s. 43 of the SPA.

682649 B.C. Ltd.;
Golden Alley Enterprises Canada Ltd.;
D.T.H. Holdings Ltd.;
All Stars Motor Inn Ltd.;
Interval Resorts Ltd.;
Bahram & Virag Maria Dabiri;
Ting Fei Ho;
Diamond Karim;
Diamond Tajdin Hassanali;
Sarosh Dastoor;
Farid Faraz; and
Klaus J. Scholz.

¶ 5 In light of that consent and the position stated by Ms. Murray on behalf of the owners, I grant that order.

¶ 6 The underlying dispute is between two factions of strata lot owners in a hotel, "Le Soleil".

¶ 7 The developer of the project and initial hotel operator, American Corporate Suites Ltd. ("ACS") got into financial difficulty.

¶ 8 One faction, the Le Soleil Owners Group ("LSOG") was formed when ACS was unable to meet its financial obligations to the original investors, including members of the LSOG. The LSOG embarked on a strategy to take over the operation of the hotel.

¶ 9 The second faction, including the petitioners, opposed the LSOG strategy which included a legal challenge of leases of part of the Strata Corporation's common property.

¶ 10 While ACS, as developer, controlled the Strata Council, the Strata Corporation entered into two leases with ACS. For a nominal \$10, the Strata Corporation leased the lobby and parking areas of the hotel to ACS and accepted responsibility for their maintenance for twenty years.

¶ 11 The LSOG's plan was to bankrupt ACS and enter into a new management agreement with Executive Inn Inc. ("Executive"). However, a secured creditor put ACS's assets up for sale by sealed bid. ACS's main assets were the two leases which were essential to running the hotel. The LSOG authorized Executive to bid \$1.5 million, but it was outbid by Sunbelt Hotel Management Services Ltd. ("Sunbelt").

¶ 12 The LSOG then pursued a strategy of attempting to have the leases set aside on the basis they were entered into by ACS, as developer, in breach of fiduciary duty.

¶ 13 To do so, the LSOG first took control of the Strata Council by electing its members to all but one of the council seats. The LSOG dominated Strata Council then approved an operating budget which included legal fees to challenge the leases. Finally, the LSOG would instigate litigation to challenge the leases by having the Strata Corporation give notice to Sunbelt terminating the leases and by having the LSOG sue the Strata Corporation.

¶ 14 Section 171 of the SPA provides:

(1) The strata corporation may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including any of the following matters:

...

(b) the common property or common assets;

...

(2) Before the strata corporation sues under this section, the suit must be authorized by a resolution passed by a 3/4 vote at an annual or special general meeting.

...

¶ 15 Section 173.1 of the SPA addresses the failure of a strata corporation to obtain the 3/4 authorization required under s. 171(2). It provides that such failure does not constitute "a defence" to any suit or arbitration which requires 3/4 authorization, nor "an objection" by a defendant to "the capacity of a strata corporation to commence or continue any suit or arbitration" not undertaken in accordance with the SPA.

¶ 16 Section 173.1 is retroactive and ensures that any unauthorized suit or arbitration is not defeated by a defendant to such a suit or arbitration for failure of a strata corporation to obtain the required 3/4 authorization. Section 173.1 does not repeal or supplant s. 171(2), which continues to provide a basis for a strata lot owner to challenge the validity of any resolution "passed" with less than a 3/4 approval, or any other action of a strata corporation or strata council, which purports to authorize the commencement of litigation. Section 173.1 does not alter this aspect of the internal management of a strata corporation.

¶ 17 It is the petitioners' contention that the Respondent Strata Council Members, acting on behalf of the LSOG, through control of the Strata Council, took steps to circumvent s. 171(2) by approving in the Strata Corporation's operating budget an extraordinary or non-recurring authorization to spend money for legal fees to engage the Strata Corporation in litigation over the validity of the leases, when they knew that the 3/4 approval required by s. 171(2) of the SPA could not be obtained.

¶ 18 The day after the May 13, 2002 Annual General Meeting of the Strata Corporation, the Respondent Strata Council Members were put on express notice by the owners opposed to challenging the leases that such litigation related expenditures were not properly approved, that the Respondent Strata Council Members would be held accountable, and that Miller Thomson was in a conflict of interest acting for the LSOG and the Strata Corporation.

¶ 19 Nevertheless, the Respondent Strata Council Members passed a resolution on May 14, 2002 to retain Miller Thomson and subsequently approved payment of almost \$200,000 in legal fees from the operating budget to challenge the leases.

¶ 20 The course followed by the Respondent Strata Council Members to challenge the validity of the leases was based on legal and management advice. Their substantive defence is that they acted in good faith on the basis of that advice.

¶ 21 Part of that advice, contained in an April 11, 2002 memo from the LSOG's legal counsel, Ms. Ramsay

Q.C., was that a resolution under s. 171(2) of the SPA passed by 3/4 of the owners was unnecessary if Sunbelt sued the Strata Corporation. Ms. Ramsay advised that a regular majority of owners could approve a resolution directing the Strata Council to terminate the lobby lease, with the "seemingly inevitable" result that Sunbelt would respond by suing the Strata Corporation. According to the memo, the funds included in the operating budget could then be used to pay for the anticipated litigation.

¶ 22 Sunbelt did not sue the Strata Corporation, in response to its purported termination of the lease.

¶ 23 At the May 13, 2002 Annual General Meeting eight of nine Strata Council members elected were LSOG members. They are the Respondent Strata Council Members. The ninth, Mr. Louie, represented the commercial section (a restaurant) of the Strata Corporation. He was not a member of the LSOG.

¶ 24 The motion to increase the budget for legal fees from \$360 to \$100,000 was introduced by Ms. Ramsay, holding a proxy from an owner who was a member of the LSOG. The explanation for the increase was that the money would be spent to "investigate" the enforceability of the leases. The LSOG had already incurred expenses of \$19,284.75 for legal advice from Ms. Ramsay on this question.

¶ 25 When the motion was introduced an objection was raised. The minutes recorded:

"An owner mentioned that they (sic) thought it was unreasonable to add \$100,000.00 to the budget for legal fees when ultimately before any legal action was commenced against any parties that a 3/4 Vote Resolution would have to be passed anyway at another General Meeting.

An Owner noted that no notice was given to the owners that such a motion was going to be presented, noted that these items being dealt with in the motion were one-time concerns not part of normal operating expenses and as such should be handled by a 3/4 Vote Resolution - particularly in view that a great number of suites were already in significant arrears with their fees and raising fees further was not helping to resolve the (arrears) problem."

¶ 26 The amount was amended to \$93,772, to exclude the commercial section. The amended motion passed. The owners of all residential strata lots were assessed contributions accordingly, which they were obliged to pay under the SPA.

¶ 27 The next day the Strata Council met, with Ms. Ramsay in the chair, and passed a resolution retaining her firm, Miller Thomson, on behalf of the Strata Corporation to provide an opinion on the leases. This was done in the face of an objection that Miller Thomson had a conflict of interest with the Strata Corporation.

¶ 28 The Respondent Strata Council Members did not disclose that they also had a conflict of interest. Miller Thomson were the LSOG's lawyers, so the Strata Corporation, not the LSOG would henceforward be paying Miller Thomson for advice on the lease issue. The LSOG had a second undisclosed conflict of interest. The LSOG had signed a contract with Executive to manage the hotel and was facing a \$600,000 claim if it failed to deliver to Executive the leases which Sunbelt had obtained through its successful bid for ACS's assets.

¶ 29 In June 2002 opponents of the LSOG strategy to challenge the leases applied for an injunction to have Miller Thomson enjoined, on the basis of a conflict of interest, from acting for the Strata Corporation.

¶ 30 Miller Thomson engaged Mr. Affleck Q.C., of Macaulay McColl for an opinion on their alleged conflict of interest. His June 7, 2002, opinion indicates the facts on which he was asked to base his opinion did not disclose that Ms. Ramsay acted for and had advised the LSOG as outlined in paragraphs 12 and 19 above, or that there had been an objection to the inclusion of the \$100,000 in the operating budget, as noted in the minutes quoted in paragraph 23 above.

¶ 31 On June 21, 2002, Mr. Justice Davies heard, but was unable to determine, the application. However, he expressed the tentative view that Miller Thomson was "at professional risk" of acting in conflict.

¶ 32 On June 25, 2002, Mr. Justice Tysoe granted the interim injunction restraining Miller Thomson from

acting for the Strata Corporation. On June 27, 2002, Miller Thomson issued its first bill to the Strata Corporation, which was paid.

¶ 33 At a meeting on July 8, 2002, the Strata Council authorized the chair, Mr. Yap, a member of the LSOG, to retain new counsel on behalf of the Strata Corporation and to issue notices of eviction in respect of the leases, consistent with the advice the LSOG had previously received from Ms. Ramsay. Also passed was a resolution that decisions of the Strata Council could be approved by a majority of council by e-mail or fax.

¶ 34 The Respondent Strata Council Members had been put on notice before the meeting that they had a conflict of interest in dealing with these matters. The only member of the Strata Council not a member of the LSOG, Mr. Louie, opposed all three resolutions.

¶ 35 The Respondent Strata Council Members made no disclosure at the meeting of any conflict of interest, nor did they disclose that the LSOG was about to sue the Strata Corporation to challenge the validity of the leases.

¶ 36 On July 11, 2002, the LSOG filed a petition to have the leases set aside ("the Betty Ang Petition"). Edwards, Kenny & Bray were retained to act for the Strata Corporation which instructed Mr. Verhoeven as counsel to support Betty Ang's position that the leases were invalid, which he did in an initial outline to the court.

¶ 37 When the respondents in the Betty Ang Petition challenged Edwards, Kenny & Bray's authority to act and alleged a conflict of interest, the Respondent Strata Council Members concealed the fact that they were instructing both the petitioner Betty Ang's counsel Campney and Murphy and Edwards, Kenny & Bray, counsel for the Strata Corporation.

¶ 38 On October 4, 2002, Mr. Justice Lowry ruled that Mr. Verhoeven was not authorized to speak on behalf of the Strata Corporation in the Betty Ang Petition. When the hearing resumed on October 16, 2002, Mr. Verhoeven's instructions from the Strata Council were to take no position on behalf of the Strata Corporation as to the validity of the leases, understandably in light of Mr. Justice Lowry's earlier ruling.

¶ 39 The Respondent Strata Council Members' strategy of budgeting and authorizing use of Strata Corporation funds to pay counsel to support the LSOG's challenge to the validity of the leases, which the LSOG had commenced through the Betty Ang Petition against the Strata Corporation, was a shambles. Much money had been spent, yet counsel for the Strata Corporation had been precluded from taking a position in support of the Betty Ang Petition.

¶ 40 The Strata Council paid Miller Thomson and Edwards, Kenny & Bray a total of \$190,398.99 in legal fees in respect of this litigation. This includes \$21,787.09 paid to Macaulay McColl for the opinion on whether Miller Thomson was in a conflict of interest, before Miller Thomson was enjoined from acting.

¶ 41 The \$93,700 budget for legal fees approved at the May 13, 2002 Annual General Meeting was not for anticipated "common expenses that usually occur either once a year or more often than once a year" as mandated by s. 92(a) of the SPA. It was to fund litigation the Respondent Strata Council Members intended to instigate by purporting to terminate the lobby lease or by having an LSOG member, Betty Ang, sue the Strata Corporation. This litigation they knew did not have the requisite 3/4 approval of owners, so expenditure for it would not receive the 3/4 approval necessary for expenditure from the contingency reserve fund.

¶ 42 Section 97(a) of the SPA provides that a strata corporation must not spend money from the operating fund unless it is consistent with the purposes of the fund set out in s. 92(a). Payment of extraordinary legal fees like litigation expense incurred at the behest of the Strata Council is not such a purpose.

¶ 43 Mr. Tan, a respondent in this case, deposed in an affidavit that because the Strata Corporation was named as a respondent, it was "forced to incur certain legal costs in relation to the Betty Ang Action". That is not so. The Respondent Strata Council Members, as LSOG members, chose to incur, planned and budgeted for those legal expenses by the Strata Corporation to advance the LSOG's strategy to have Executive operate the

hotel.

¶ 44 Mr. Tan acknowledged on cross-examination that the Betty Ang Petition was brought on behalf of all 93 LSOG members who paid Ang's counsel and that he was a member of an LSOG committee instructing that counsel, Campney and Murphy, at the same time he was a member of the Strata Council.

¶ 45 As such Mr. Tan was aware of the impending Betty Ang Petition in advance of it being filed on July 11, 2002, and of the strategy of naming the Strata Corporation as a respondent in the Betty Ang Petition so that Strata Corporation funds could be expended for counsel in that proceeding. The Respondent Strata Council Members instructed Mr. Verhoeven to support Betty Ang. Only after Lowry J. ruled that Mr. Verhoeven was not properly authorized to represent the Strata Corporation did the Strata Council instruct him to take no position.

¶ 46 Mr. Tan acknowledged on cross-examination that he and four other LSOG members, who were also Strata Council members, were instructing counsel for the petitioner Betty Ang and the respondent Strata Corporation simultaneously, although he claimed to be unaware of any conflict of interest.

¶ 47 On November 5, 2002, Lowry J. dismissed the Betty Ang Petition on the basis that only the Strata Corporation could challenge the leases in an action properly constituted and approved pursuant to the SPA, noting at [2002] B.C.J. No. 2506, 2002 BCSC 1544, para. 17:

LSOG is apparently unable to muster sufficient support among the owners to obtain the requisite three quarters vote that would authorize the Strata Corporation to make this application. Thus, by having Ms. Ang apply, it seeks to circumvent the governance provisions of the Act and achieve what it cannot achieve through a special meeting of the owners.

¶ 48 At the February 2003 Annual General Meeting of the Strata Corporation a resolution to approve litigation by the Strata Corporation to challenge the validity of the leases failed to obtain the necessary 3/4 majority.

¶ 49 However, a further \$100,000 was included in the operating budget for legal fees, based on the previous budget. On cross-examination, Mr. Tan acknowledged this was included to pay for a possible court challenge of the leases by the Strata Corporation. This despite the defeat of the required resolution approving such litigation.

¶ 50 By June 2004 the LSOG ceased to be a majority of owners, although they still controlled the Strata Council, because there had been no election of Strata Council members at an Annual General Meeting.

¶ 51 No Annual General Meeting was held for almost two years from February 2003 until January 2005.

¶ 52 In June 2004, the Strata Council spent \$38,000 to retain Clark, Wilson to commence an action in the name of the Strata Corporation to challenge the leases. The LSOG members on the Strata Council knew they could not get a 3/4 majority of the owners to authorize that action or to approve the expenditure for the litigation. They did not even pass a Strata Council resolution to purportedly authorize the action.

¶ 53 The action was clearly unauthorized and prompted the petitioners to bring the present petition. In January 2005, Mr. Justice Groberman granted an injunction prohibiting the expenditure of Strata Corporation funds on the unauthorized litigation until after the 2005 Annual General Meeting.

¶ 54 The Annual General Meeting was scheduled for January 31, 2005. The Strata Council proposed a budget including legal fees of \$150,000 which Mr. Tan acknowledged was for litigation to challenge the leases.

¶ 55 On cross-examination Mr. Tan acknowledged he was aware of the terms of the injunction when he and other LSOG members of the Strata Council passed a resolution by e-mail on January 19, 2005, instructing the property manager to issue a \$50,000 cheque to pay Robert King Law Corporation a retainer to proceed with the unauthorized litigation. In light of the injunction granted by Groberman J., the property manager refused to prepare a cheque to give effect to this resolution.

¶ 56 At the January 31, 2005 Annual General Meeting a new Strata Council was elected which instructed counsel to discontinue the unauthorized litigation.

¶ 57 I am satisfied the extensive record filed in support of this application provides, in every excruciating detail, a proper basis for finding all the facts necessary to determine the matter under Rule 18A. I therefore reject the Respondent Strata Council Members' counsel's submission that the case is unsuitable for resolution under Rule 18A.

¶ 58 The Respondent Strata Council Members' next submission is that the petitioners cannot maintain this action because the wrong they allege, expenditure of funds on unauthorized litigation, resulted in a loss not to the petitioners but to the Strata Corporation, as reflected in the relief claimed by the petitioners, which is that the Strata Corporation be repaid by the Respondent Strata Council Members.

¶ 59 There can be no doubt on the facts that the Respondent Strata Council Members, as members of the Strata Council, pursued a strategy to advance the LSOG's interests by pursuing court challenges to the validity of the leases. They did so with knowledge that the necessary resolution of 3/4 of the owners to authorize the Strata Corporation to embark on litigation could not be obtained.

¶ 60 At the July 8, 2002, meeting of the Strata Council, which authorized Mr. Yap to retain counsel for the Strata Corporation and thereby incur expense on behalf of the Strata Corporation, none of the Respondent Strata Council Members disclosed that the Betty Ang Petition was imminent or that the LSOG had instructed counsel in that case to name the Strata Corporation as a respondent.

¶ 61 The Respondent Strata Council Members successively retained Miller Thomson, Edwards, Kenny & Bray and Clark, Wilson to support the LSOG objective of challenging the leases in court and authorized the expenditure of money from the operating budget for that purpose.

¶ 62 The Respondent Strata Council Members authorized money in the budget for that purpose with the knowledge that the expenditure of money to litigate the validity of the leases did not have the support of 3/4 of the owners. By failing to obtain the necessary resolution under s. 171(2) of the SPA and by approving first the budget for legal fees and then the expenditure, they did the very thing they knew did not have the requisite support of 3/4 of the owners. They deprived the non-LSOG owners of their right to insist that the support of 3/4 of the owners be obtained by resolution before such an expenditure was made.

¶ 63 Sections 32 and 33 of the SPA provide:

32 A council member who has a direct or indirect interest in a contract or transaction with the strata corporation must

- (a) disclose fully and promptly to the council the nature and extent of the interest,
- (b) abstain from voting on the contract or transaction, and
- (c) leave the council meeting

- (i) while the contract or transaction is discussed, unless asked by council to be present to provide information, and
- (ii) while the council votes on the contract or transaction.

- 33(1) If a council member who has an interest in a contract or transaction fails to comply with section 32, the strata corporation or an owner may apply for an order under subsection (3) of this section to a court having jurisdiction unless, after full disclosure of the nature and extent of the council member's interest in the contract or transaction, the contract or transaction is ratified by a resolution passed by a 3/4 votes at an annual or special general meeting.
- (2) For the purposes of the 3/4 vote referred to in subsection (1), a person who has an interest in the contract or transaction is not an eligible voter.
 - (3) If, on application under subsection (1), the court finds that the contract or

transaction was unreasonable or unfair to the strata corporation at the time it was entered into, the court may do one or more of the following:

- (a) set aside the contract or transaction if no significant injustice will be caused to third parties;
- (b) if the council member has not acted honestly and in good faith, require the council members to compensate the strata corporation or any other person for a loss arising from the contract or transaction, or from the setting aside of the contract or transaction;
- (c) require the council member to pay to the strata corporation any profit the council member makes as a consequence of the contract or transaction.

¶ 64 By voting on the numerous resolutions before the Strata Council, on and after May 14, 2002, to give effect to their strategy to engage the Strata Corporation in litigation over validity of the leases, without disclosing their numerous and obvious conflicts of interest in such a "transaction", the Respondent Strata Council Members acted contrary to s. 32 of the SPA. Had they complied with s. 32 and s. 33 of the SPA, the Strata Council resolutions could not have passed and the Strata Corporation would have been spared nearly \$200,000 in fruitless expenditure on legal fees.

¶ 65 By failing to comply with s. 32 and s. 33 of the SPA, the Respondent Strata Council Members authorized contracts and transactions which were "unreasonable and unfair to the Strata Corporation" under s. 33(3) in that they knowingly circumvented the requirement of s. 171(2) and authorized the expenditure of funds from the operating budget which could only have been legally expended with authorization by 3/4 of the strata lot owners.

¶ 66 Considerable sums of the Strata Corporation's funds were expended on legal fees in a deliberate attempt to advance the LSOG strategy of challenging the leases, with no benefit to the LSOG, let alone to the Strata Corporation.

¶ 67 The Respondent Strata Council Members rely on s. 31 of the SPA in defence of their actions. That section provides:

31 In exercising the powers and performing the duties of the strata corporation, each council member must

- (a) act honestly and in good faith with a view to the best interests of the strata corporation, and
- (b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

¶ 68 The Respondent Strata Council Members argue that they acted on the advice of lawyers and a property manager and therefore did so "honestly and in good faith with a view to the best interests of the strata corporation". It follows, their counsel argues, that they cannot be liable to repay the Strata Corporation under s. 33(3)(b) of the SPA for the legal fees wasted in pursuing their strategy of litigation to challenge the leases.

¶ 69 Failure to comply with the mandatory disclosure provision of s. 32 of the SPA cannot be characterized as acting "honestly and in good faith" nor does it reflect the exercise of "the care, diligence and skill of a reasonably prudent person in comparable circumstances."

¶ 70 The Respondent Strata Council Members were not counselled against the strategy they pursued by the lawyers they engaged and were encouraged to pursue it by advice they received. However, the Respondent Strata Council Members were warned time and again by their opponents that they were acting in a conflict of interest and contrary to the provisions of the SPA, yet they never heeded those warnings nor did they seek independent legal advice as to their potential liability as Strata Council members.

¶ 71 The law firm which recommended the LSOG strategy was found in conflict of interest by the court in

June 2002, when retained to act for the Strata Corporation. Even then the Respondent Strata Council Members persisted in confusing their own interests as members of the LSOG with those of the Strata Corporation. The LSOG had obtained the initial opinion that the leases were susceptible to challenge from the firm which also provided the LSOG with advice that Strata Corporation funds could be used to pay for litigation challenging the leases without the approval of 3/4 of the owners, by budgeting legal fees as an operating expenditure and having the LSOG's surrogate Betty Ang sue the Strata Corporation.

¶ 72 Even after the LSOG strategy of supporting the Betty Ang Petition was dashed when Lowry J. ruled that Mr. Verhoeven was unauthorized to represent the Strata Corporation to support the Betty Ang Petition, the Respondent Strata Council Members persisted in their strategy by purporting to retain, instruct and pay counsel to initiate, on behalf of the Strata Corporation, the very action they knew was not supported by a resolution of 3/4 of the owners.

¶ 73 Section 171(2) of the SPA indicates the Legislature determined that initiation of only such litigation as is approved by a resolution of 3/4 of the owners is in the best interests of the Strata Corporation. Without that measure of support the expense, including the potential exposure to costs if the litigation is unsuccessful, may be presumed to outweigh the benefits to the Strata Corporation. This proved to be so in this case where there was considerable expense and no benefit.

¶ 74 Whether the Strata Corporation would have benefited from having the leases set aside is not an issue the Court need decide. More than one quarter of the owners opposed the litigation to challenge the leases and those owners had the right under s. 171(2) of the SPA to prevent the Strata Corporation from becoming involved in such litigation. The Respondent Strata Council Members, on behalf of the LSOG, deliberately set out to deprive the minority owners of that statutory right.

¶ 75 The Respondent Strata Council Members attempted to circumvent s. 171(2) of the SPA by purporting to terminate the leases with a view to prompting Sunbelt to sue the Strata Corporation. When that failed, they instigated the Betty Ang Petition against the Strata Corporation and initially instructed counsel for the Strata Corporation to support the case the LSOG brought against it.

¶ 76 The Respondent Strata Council Members were obliged to serve the Strata Corporation honestly and in good faith, yet they in effect sued the Strata Corporation for their own intended gain as members of the LSOG. They failed to meet the standard of care of a reasonably prudent person in comparable circumstances as mandated by s. 31 of the SPA. The contracts to pay and payments of legal fees to pursue this course of litigation were "unreasonable and unfair to the strata corporation."

¶ 77 The Respondent Strata Council Members did not act honestly and in good faith. There is ample evidence they ignored their opponents' warning of conflict of interest and went to remarkable lengths to resist their opponents' attempts to hold them to account for a litany of irregular and unauthorized actions as members of the Strata Council.

¶ 78 I note this is not a situation where the Respondent Strata Council Members were elected to the Strata Council and then unwittingly drawn into developments not of their own making. They sought election to the Strata Council to effect the very strategy which has exposed them to liability.

¶ 79 I grant the declaration sought in the petitioners' Notice of Motion and find the appropriate remedy is that the Respondent Strata Council Members repay to the Strata Corporation the \$190,398.99 legal fee which provided no benefit to the Strata Corporation. I so order pursuant to s. 33(3)(b) of the SPA.

¶ 80 I find on the voluminous evidence before me, that the Respondent Strata Council Members subverted the interests of the Strata Corporation to their own interests as LSOG members. They received repeated express warnings from their opponents that they were in a conflict of interest. There was mounting evidence, such as the injunction against Miller Thomson and the order of Lowry J. that Mr. Verhoeven was not properly authorized to represent the Strata Corporation, that the strategy they were pursuing was replete with conflicts. Yet they persisted. In light of this, I find the Respondent Strata Council Members acted in a reprehensible manner deserving of rebuke by the court through an award of special costs.

¶ 81 The Respondent Strata Council Members will be jointly and severally liable for the repayment to the Strata Corporation of the \$190,338.99 and the petitioners' costs.

E.R.A. EDWARDS J.

QL UPDATE: 20050825
cp/i/qw/qlemo/qlbrl